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Foo Lian Sin & Anor v Ng Chun Lin & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A–02–3 16 OF 2000

B ABDUL HAMID MOHAMAD, KC VOHRAH AND MOHD NOOR AHMAD JJCA

28 AUGUST 2004

Contract Law — Mistake — Rectification — Sale of tenanted shophouse wrongly
C *described in sale and purchase agreement — Whether description of shophouse number should prevail over description of land — Whether mutual mistake*

Land Law — Conveyancing — Rectification — Sale of tenanted shophouse wrongly
D *described in sale and purchase agreement — Whether description of shophouse number should prevail over description of land — Whether mutual mistake*

The second plaintiff was the tenant of shophouse No 9, adjoining shophouse No 11
E which was occupied by the first defendant. Both shophouses was originally owned by Hung Chun Sdn Bhd and subsequently sold to the parties. The plaintiffs claimed that a mutual mistake had occurred in the conveyance of the two shophouses resulting in the defendants becoming the registered proprietors of shophouse No 9 which was purchased by them and the plaintiffs becoming the registered proprietors of shophouse No 11. The defendants denied that there was such a mistake. The
F learned judge, having been satisfied that there was a mutual mistake in conveyance of the respective lots to the respective parties, made an order directing the registrar or land administrator to make necessary rectification of the respective register document of title as well as on the issued document of title. The defendants appealed.

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Held, allowing the appeal:

The sale and purchase agreement ('the SPA'), the charge and the Schedule to the Annexture thereto and the 'Suratan Hakmilik Sementara' were consistent in that it
H was HS(D)Ka 6792/79 PT 18177 that was purchased by the defendants. However in the SPA the shophouse number was wrongly described as 'No 11' when it should be 'No 9'. That was the only document that mentioned the shophouse number (see para 14). The shophouse number clearly could not prevail over the 'Suratan Hakmilik Sementara' and the 'PT No' in all the documents. Shophouse number was the number given by the Local Authority for the purpose of assessment. Furthermore,
I the shophouse was part of the land. It could not be sold without the land. It was the land that was sold with the shophouse standing on it (see para 16). The plaintiffs might have been mistaken into thinking that they were purchasing shophouse No 9; if that was the case, that was their mistake — it was not a mutual mistake between the defendants and the plaintiffs (see para 17).

[Bahasa Malaysia summary

Plaintif kedua merupakan penyewa rumah kedai No 9, bersebelahan dengan rumah kedai No 11 yang didiami oleh defendan pertama. Kedua-dua rumah kedai itu adalah milik asal Hung Chun Sdn Bhd dan kemudiannya telah dijual kepada pihak-pihak berikut. Plaintif-plaintif mendakwa bahawa telah berlaku kesilapan yang sama dalam pemindahhakkan kedua-dua rumah kedai itu menyebabkan defendan-defendan menjadi tuanpunya berdaftar rumah kedai No 9 yang dibeli oleh mereka dan plai tif-plaintif menjadi tuanpunya berdaftar rumah kedai No 11. Defendan-defendan menafikan berkalu kesilapan sedemikian. Hakim yang bijaksana, setelah berpuas hati bahawa terdapat kesilapan bersama dalam pemindahhakkan lot-lot berkaitan kepada pihak-pihak berkaitan, telah membuat satu perintah mengarahkan pendaftar atau pentadbir tanah membuat pembetulan yang perlu berkaitan surat ikatan hak milik berdaftar dan juga ke atas surat ikatan hak milik yang telah dikeluarkan. Defendan-defendan telah membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

Perjanjian jual beli ('PJB'), gadaian dan Jadual kepada Lampiran tersebut dan Suratan Hakmilik Sementara adalah konsisten dan ia adalah HS(d)Ka 6792/79 18177 yang telah dibeli oleh defendan-defendan. Namun dalam PJB, nombor rumah kedai teah tersilap digambarkan sebagai 'No 11' padahal ia sepatutnya adalah 'No 9'. Itulah satu-satunya dokumen yang menyatakan nombor rumah kedai itu (lihat perenggan 14). Nombor rumah kedai tersebut jelas tidak boleh mengatasi Suratan Hakmilik Sementara dan No PT dalam semua dokumen. Nombor rumah kedai adalah nombor yang diberikan oleh pihak berkuasa tempatan bagi tujuan penaksiran. Bahkan, rumah kedai itu adalah sebahagian daripada tanah. Ia tidak boleh dijual tanpa tanah tersebut. Ia adalah tanah yang dijual dengan rumah kedai yang dibina di atasnya (lihat perenggan 16). Plaintif-plaintif mungkintersilap semasa memikirkan bahawa mereka telah membeli rumah kedai No 9, jika itulah kesnya, yang merupakan kesilapan mereka — ia bukan satu kesilapan bersama antara defendan-defendan dan plaintif-plaintif (lihat perenggan 17).]

Notes

For cases on rectification due to mistakes, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3916-3918.

For a case on rectification in conveyancing, see 8(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2362.

Cases referred to

Clarke v The Earl of Dunraven and Mount Earl [1897] AC 59 (refd)

Kluang Wood Products Sdn Bhd v Hong Leong Finance Bhd [1994] 4 CLJ 141 (refd)

Legislation referred to
Specific Relief Act 1950 s 30

Appeal from: Civil Suit No 22-118 of 1996 (High Court, Ipoh) (previously known as Originating Summons No 24–148 of 1996)

Chan Kok Keong (Yan Wai Leong with him) (Chan & Associates) for the appellant.
Ng Poh Tat with Ng Whin Cheng (Ng Poh Tat & Co) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court):

[1] As there has been some confusion in the description of the two shophouses in question, we shall first make it clear that, in our judgment, shophouse No 9 refers to the shophouse standing on land held under HS(D) Ka 6792/79 PT 18177 and shophouse No 11 refers to the shophouse standing on land held under HS(D) Ka 6793/79 PT 18178. The two shophouses are adjoining to each other. The second plaintiff was occupying shophouse No 9 as a tenant of a company called Hung Chun Sdn Bhd and operating a provision shop. The first defendant was occupying shophouse No 11, also as a tenant of the same company. He operated a mini market at his own shophouse No 7 which is adjoining shophouse No 9.

[2] As pointed out by the learned judge, both first plaintiff and the second defendant were uninvolved parties in the action. They were cited as parties because they were co-proprietors of the respective land on which the two shophouses were erected.

[3] The plaintiffs claim that a mutual mistake had occurred in the conveyance of the two shophouses resulting in the defendants becoming the registered proprietors of shophouse No 9 which was purchased by them and the plaintiffs becoming the registered proprietors of shophouse No 11. The defendants denied that there was such a mistake.

[4] The learned judge, after a full trial, made a finding of fact that there was a mistake in the conveyance of the two shophouses to the parties. He believed Mr Yee Weng Thong, the Managing Director of Hung Chun Sdn. Bhd and landlord of the two shophouses whose evidence, in his view, was corroborated by Dato' Daniel Tay, the solicitor who prepared the sale and purchase agreements for the transfer of the two shophouses to the respective parties. The learned judge found that their evidence lent credence to the second plaintiffs claim.

[5] On the first defendant's claim that he had intended to purchase shophouse No 9, the learned judge said:

> On the other hand, the first defendant's claim that he had intended to purchase only shop No 9 is inconsistent with his inactivity immediately after the purchase. He had not as he would be expected to, taken any step to obtain vacant possession of shop No 9 which was

being occupied by the plaintiffs. Neither did he take any step to move out of shop No 11 which he was occupying in order to allow the plaintiffs to occupy it.

His conduct after the purchase clearly shows that he had settled on the status quo before the respective purchase of the lots by the parties -with him occupying and remaining at shop No 11 and the plaintiffs remaining where they were at shop No 9 to continue to operate their provision shop. Even more telling is the fact that he had continued to collect rent from the tenant of the upstairs portion of shop No 11 well after the purchase, stopping only after April 1995 after the second plaintiff informed him of the discrepancy.

In the event and for the reason aforesaid, I must so find that the respective land had been conveyed to the respective purchaser by mistake when the correct conveyance should have been as follows:

> The land described as HS (D) Ka 6792/79 PT 18177 to the plaintiffs. The land described as HS (D) Ka 6793/79 PT 18178 to the defendants.

I must also find for the same reasons that the mistake was mutual to the plaintiffs and the defendants at the time of the conclusion of the respective sales and purchase agreement in that the plaintiffs had indeed intended to purchase shop No 9 and the defendants shop No 11 -although there was no direct contractual relationship between the plaintiffs and the defendants, a salient point of law raised by counsel for the defendants which I shall consider shortly.

[6] On the issue whether there was privity of contract between the plaintiffs and the defendants, the learned judge held:

> The rule with respect to the rectification of instruments under s 30 of the Specific Relief Act 1950 is concerned with 'mutual mistakes of the parties' which could only arise between parties to a contract. It follows that unless the plaintiffs are able to establish in law that there is a contractual relationship with the defendants, a rectification of the register document of title of their property does not arise - an issue which I shall now consider.

[7] The learned judge then went on to discuss the issue whether there was a contract between the parties and concluded that there was a collateral contract between them. Having been satisfied that there was a mutual mistake in conveyance of the respective lots to the respective parties, the plaintiffs 'are entitled to activate the provision of s 30 of the Specific Relief Act 1950 to rectify the respective entry in the register document of title to express the true intent of the parties'. He therefore made the order directing the registrar or land administrator to make necessary rectification the respective register document of title as well as on the issued document of title.

[8] Was there a mutual mistake? Whilst we appreciate that that is a finding of fact by the learned trial judge, we are of view that there are sufficient grounds for us to differ. Both parties had wanted to purchase shophouse No 9, the second plaintiff because he was occupying it and the first defendant because he was operating a mini-market at the adjoining shophouse No 7 and wanted to extend his mini market.

[9] Let us look at the documents more closely. The sale and purchase agreement dated 11 May 1994 between Hung Chun Sdn Bhd (the vendor) and Foo Lian Sin and Law Yoke Lan (appellants/defendants) states that the land in question is HS(D) Ka 6792/79 PT 18177 but it went on to say 'with a shophouse erected thereon

known as No 11'. The shophouse described as No 11 is clearly wrong. The shophouse standing on that land is shophouse No 9.

[10] In Form 16A (gadaian) dated 14 September 1994 prepared by Daniel Tay Kwan Hui, the same solicitor, described the land charged by the appellants/defendants to Malayan Banking Bhd as No PT 18177 and 'Jenis dan No Hakmilik' as HS(D) Ka 6792/79'. The same description of the land is stated in the Schedule to the Annexture thereto.

[11] Form 11 A, the 'Suratan Hakmilik Sementara' dated 24 February 1995 shows that the appellants/defendants are the registered proprietors of land described as 'No PT 18177'.

[12] On the other hand, the sale and purchase agreement dated 13 May 1994 (two days after the date of the sale and purchase agreement executed by the appellants/defendants with the same vendor and prepared by the same solicitor) described the subject land as 'HS(D) Ka 6793/79 PT 18178' and went on to say 'with a shophouse erected thereon known as No 9'. Here again there is a mistake. The number of the shophouse standing on that land is shophouse No 11.

[13] Form 11A (Suratan Hakmilik Sementara) in respect of PT 18178 shows that the registered proprietors are Ng Chun Lin and Lim Lian Tiam (respondents/plaintiffs).

[14] It is clear that the sale and purchase agreement, the charge and the Schedule to the Annexture thereto and 'Suratan Hakmilik Sementara' are consistent in that it was HS(D) Ka 6792/79 PT 18177 that was purchased by the appellants/defendants. However, in the sale and purchase agreement the shophouse number was wrongly described as 'No 11' when it should be 'No 9'. That is the only document that mentions the shophouse number.

[15] It is also clear that the sale and purchase agreement and the 'Suratan Hakmilik Sementara' are consistent that it was HS(D) Ka 6793/79 PT 18178 was purchased by the respondents/plaintiffs. Again, the mistake is in the description of the shophouse number which was wrongly described as 'No 9' when it should be 'No 11'.

[16] Which should prevail, the shophouse number or the description of the land in the 'Suratan Hakmilik Sementara' and the 'PT No' in all the documents, including the sale and purchase agreements? Clearly, the shophouse number cannot prevail over the later. Shophouse number is the number given by the local authority for the purpose of assessment. Furthermore, the shophouse is part of the land. It cannot be sold without the land. It is the land that is sold with the shophouse standing on it.

[17] So, from the point of view of the appellants/defendants they wanted to buy land described as HS(D) Ka 6792/79 PT 18177 with the shbphouse standing on it. That is what they got. The respondents/plaintiffs might have been mistaken in

thinking that they were purchasing shophouse No 9 when they bought the land described as HS(D) Ka 6793/79 PT 18178. If that is the case, that is their mistake. It may be that the solicitor had made a mistake. If that is the case, then the respondents/plaintiffs should have sued the solicitor. Whether it was the mistake of the respondents/plaintiffs or the solicitor, the mistake is not a mutual mistake between the appellants/defendants and the respondents/plaintiffs.

[18] On that ground we are of the view that there was no mutual mistake as between the parties.

[19] On the issue of privity of contract between the parties, the learned judge had correctly held that there was no privy of contract between them.

[20] However, the learned judge also found that there was a collateral contract between the parties. He cited a number of authorities. We do not think that it is necessary to discuss them as we are of the view that they are not on point. For example, the case of *Clarke v The Earl of Dunraven and Mount Earl* [1897] AC 59 concerned two participants in a regatta organised by a yatch club, the rules of which club bound the participants to pay all damages caused by fouling. Hence, when one of the participants fouled the other's yatch, he was liable to pay damages to the other. The House of Lords held that there was a contract between the participants collateral to the main contract with the yatch club. That is because the participants had accepted the rules to be binding on them.

[21] This is not such a case. Here the only thing in common was that the vendor was the same. By the respective sale and purchase agreements, the vendor sold two different pieces of land to two different purchasers. There were no terms common, binding an affecting both parties as in that case.

[22] *Kluang Wood Products Sdn Bhd v Hong Leong Finance Bhd* [1994] 4 CLJ 141 concerns an oral representation by one of the contracting parties to provide end financing. That was held to be a collateral contract besides the main contract as between the same parties.

[23] The 'mistake' in this appeal is not such a case. There is no main contract as between the plaintiffs and the defendants.

[24] It is also pertinent to note that the existence of a collateral contract between the parties was not even pleaded.

[25] On these grounds we allowed the appeal and set aside the orders of the learned judge. As, at the time we gave our decision we understood that no decision had been given in respect of the counterclaim we directed the learned judge to give his decision

on the counterclaim. We also ordered the respondents/plaintiffs to pay the costs of this appeal and the costs in the court below and that the deposit to be paid to the appellants/defendants towards taxed costs.

Appeal allowed.

Reported by Loo Lai Mee